September 29, 2017

VIA EMAIL

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Minister of Innovation, Science and Economic Development Canada
House of Commons
Ottawa, ON K1A 0A6

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The Copyright Board of Canada
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Re: **Comments of Re:Sound in response to "A Consultation on Options for Reform to the Copyright Board of Canada"**

Re:Sound Music Licensing Company ("Re:Sound")

Re:Sound is the not-for-profit collective society authorized under Part VII of the Copyright Act to collect and distribute royalties under section 19 of the Act on behalf of performers and makers of sound recordings. Section 19 grants performers and makers a right to receive equitable remuneration when their sound recordings are performed in public or communicated to the public by telecommunication. Equitable remuneration is the only right which performers and makers have with respect to the performance and communication of their recordings. They do not have the right to prevent the use of their recordings or to sue for infringement, making the royalties they receive as equitable remuneration all the more important.

The amount of equitable remuneration payable to Re:Sound's members is determined by the Copyright Board through the process of certifying proposed tariffs under section 68 of the Act. Under the current legislation, all royalties payable to Re:Sound's members must be approved by the Copyright Board through certified tariffs. The royalties determined by the Board are an increasingly critical source of revenue for performers and makers, who depend on them for their livelihood. Re:Sound and its members, who represent thousands of performing artists and record labels, are therefore directly affected by the procedures of the Copyright Board and welcome the opportunity to participate in this important consultation.

General Comments

Re:Sound thanks Minister Bains, Minister Joly, and the Copyright Board of Canada for undertaking this consultation and for allowing stakeholders to provide input regarding methods of improving the Board's tariff-setting processes. The Copyright Board serves an essential function in setting royalties which directly impact the viability of the Canadian recorded music industry. On behalf of the rights holders it represents, Re:Sound supports the stated goals of the consultation to, "enable creators to get paid properly and on time.[1]"

The key reforms necessary to achieve the objectives of this consultation are:

1. Impose statutory deadlines for Board decisions;
2. Establish objective rate-setting criteria;
3. Make the tariff certification process optional for all collectives; and
4. Implement case management of Board proceedings.

In the following section, Re:Sound provides its comments on each of the 13 possible options for legislative and regulatory reforms outlined in the government's discussion paper, "A Consultation on Options for Reform to the Copyright Board of Canada" (the "Discussion Paper") as well as additional suggestions for potential changes. Attached as Appendix "A" is a chart summarizing Re:Sound's comments.

Proposed Reforms Outlined in the Discussion Paper

1. Explicitly require or authorize the Board to advance proceedings expeditiously

a. Re:Sound's Comments

Legislative and/or regulatory language emphasizing the importance of proceeding expeditiously could be helpful, however it would need to be accompanied by statutorily-imposed time limits in order to have a practical effect. Re:Sound recommends that the "requirement" model used by the National Energy Board be adopted, with prescribed time limits:

> … all applications and proceedings before the Board are to be dealt with as expeditiously as the circumstances and considerations of fairness permit, but, in any case, within the time limit provided for under this Act, if there is one[2].

b. Recommendations regarding the appropriate enacting instrument

Given the existing language in sections 67.1(5), 68(1) and 68(4)(a) of the Act which direct the Board to publish proposed tariffs, consider a proposed tariff and any objections thereto, and publish the approved tariffs, "as soon as practicable," the most appropriate enacting

[1] August 9, 2017 News Release from Innovation, Science and Economic Development Canada titled "Consultations launched on reforming Copyright Board of Canada".
[2] National Energy Board Act, s.11(4).

instrument would be amendments to the Act. Any such amendments should replace the current language in these provisions and specifically direct that the certification process under section 68(3) and the issuance of reasons under section 68(4)(b) be conducted expeditiously. However, if the passage of regulations provides a faster means of effecting this change, language requiring the Board to proceed expeditiously could be established by Regulation pursuant to either section 66.91 or 66.6(1).

2. Create new deadlines or shorten existing deadlines in respect of Board proceedings

a. Re:Sound's Comments

Statutorily-imposed time limits on Board decisions are one of the most important reforms needed to achieve the objectives of this consultation. The following proposed timelines would benefit both rights holders and users by providing a faster process to obtain certainty regarding royalty obligations and revenue to rights holders:

i. Tariffs be certified no later than 12 months after the end of a hearing, consistent with the regimes in the United States[3] and Germany[4]. The end of the hearing should be defined as the final day of closing arguments.

ii. In the case of unopposed and settled tariffs that are filed with the Board without the need for a hearing, the deadline for certification should be 6 months following filing.

iii. In the event it is not possible for the Board to issue the reasons for its decision by these deadlines, it could still certify the tariff, with reasons to follow. It is the timing of tariff certification which is critical as certification allows rights holders to start receiving royalties and provides users with certainty as to their royalty obligations.

iv. Inaugural tariffs for which no royalties can be collected prior to certification should be prioritized. Delays in certification of inaugural tariffs results in a loss of royalties to rights-holders given the difficulties of retroactive collections particularly in industries such as nightclubs and restaurants where the businesses may no longer be in operation by the time of certification. They also create an impediment to businesses who may be reluctant to launch without certainty as to their royalty obligations.

v. Where Board rulings are required on interim steps (such as interrogatories) and procedural issues (such as confidentiality or the disclosure of documents), or where the Board is directing the conduct of studies or surveys, such rulings must be issued expeditiously or they result in the schedule having to be adjusted with either the hearing having to be delayed or the timelines shortened, prejudicing the parties'

[3] Pursuant to U.S., 17 USC §803(c)(1), decisions must be issued: (i) 11 months after the post-discovery settlement conference (if agreement not reached); or (ii) in the case of a renewal tariff, 15 days before the expiration of the tariff's current term.

[4] In Germany, the Arbitration Board is required to issue its proposal for an agreement within 1 year of initiation of the proceeding.

ability to prepare their evidence and fully present their cases. Board rulings on procedural steps should be issued within 2 weeks.

In order to ensure procedural fairness, allowing all parties the right to fully present their evidence, flexibility should be maintained with respect to the deadlines for interim steps in a proceeding, such as interrogatories and the filing of cases. The Board's current process of encouraging the parties to jointly develop a schedule, which can be adjusted where required, should be maintained. Setting an accurate schedule would be greatly facilitated if deadlines were established in advance for Board rulings on interim steps as discussed above.

In order to facilitate settlement discussions and to reduce the number and frequency of tariff hearings, the parties should continue to be allowed to determine amongst themselves when to initiate a hearing. This ensures that resources (of both the parties and the Board) are not wasted on commencing proceedings while settlement discussions are still ongoing. It also allows parties to combine proposed tariffs and bring proceedings for multiple years, to consolidate them with other similar proceedings where appropriate, and to wait until the appropriate time to initiate a proceeding (for instance after the judicial review of the previous tariff has been determined). Further, it allows the parties to prioritize which tariffs should be heard first such as inaugural tariffs or tariffs with rapidly-evolving industries such as music streaming.

Maintaining flexibility in both the timing of the start of a proceeding and internal deadlines will facilitate the objectives of efficiency and expediency by reducing the unnecessary use of the Board's resources and limiting the number and frequency of hearings. As discussed below, implementing case management will also be useful in ensuring proceedings move expeditiously, based on the particular circumstances of each case.

b. Recommendations regarding the appropriate enacting instrument

The deadlines outlined above could be established by Regulation pursuant to either section 66.91(b) or 66.6(1)(a) and (b).

3. Implement case management of Board proceedings

a. Re:Sound's Comments

Early and effective case management, including options for pre-hearing mediation, could be very helpful in streamlining Board proceedings and would benefit all parties and the Board. Case management would be particularly useful to identify and potentially narrow the issues in a proceeding, clarify the type of evidence the Board would find helpful, and in particular, to simplify the interrogatory process. Currently, the interrogatory process requires at least 7 sets of written submissions/responses per party, with rulings required by the Board on both the appropriateness of the questions asked and the sufficiency of the answers given. If case conference calls were held in lieu of these written motions, with the Board member holding the conference empowered to issue orders either at, or shortly after the conference, this would greatly improve the efficiency of the interrogatory process and reduce the amount of written

material prepared by the parties and reviewed by the Board. Objections to interrogatories often stem from misunderstandings regarding the scope and language of the interrogatory and objections could be more easily resolved verbally. Such a procedure is similar to certain case management practices of the Federal Court as well as the staff-assisted mediation and arbitration procedures used by the CRTC.

b. Recommendations regarding the appropriate enacting instrument

Implementing case management does not require any legislative change and could simply be provided for in the Board's Model Directive of Procedure or more detailed Rules of Procedure. It could be more formally enacted by Regulation pursuant to section 66.6.

4. Empower the Board to award costs between parties

a. Re:Sound's Comments

There is no benefit to any participant in Board proceedings in allowing the Board to award costs against parties and such a measure would undermine the procedural fairness of Board proceedings. Under the current regime, collectives such as Re:Sound must bring tariff certification proceedings before the Board in order to collect royalties. The participation of objectors from the relevant industry is important in order to obtain necessary information about the industry and to ensure that the resulting tariff reflects the input of both rights holders and music users. Neither collectives nor relevant objectors should be deterred from participating in Board proceedings for fear of having costs awarded against them. Nor should any party be discouraged from presenting their evidence fully, for fear of a costs award. Participation in Board proceedings is already costly in terms of time and legal expenses. In Re:Sound's experience, all parties share the same goal of trying to conduct proceedings as efficiently as possible. The former chair of the Board, The Honourable Justice Vancise has stated that in his tenure at the Board, he saw no circumstances that would justify awarding costs:

> With respect to recommendation 1 of the report, the awarding of costs in a regulatory proceeding as distinct from a trial or other adversarial process is not only impossible but not helpful. To take an obvious example, should Access Copyright be punished in costs in both Government and K- 12 because it did not achieve the amount of the tariff that it requested or should it receive costs on a lesser scale because it achieves only a minimal amount of what it requested. The Board's role is to set a tariff that is fair and equitable both for the right holders and the users. There are no winners and no losers. In my tenure at the Board, I can hardly think of a situation that would have warranted awarding costs. The legal community that practices before the Board acts in good faith, representing their clients' interests vigorously. There may be at times examples of "remedial overreach" or expressions of "litigation culture" but this does not warrant costs[5].

b. Recommendations regarding the appropriate enacting instrument

[5] May 25, 2016 Speech of the Honourable William J. Vancise at the ALAI Symposium – The Copyright Board of Canada: Which Way Ahead?

No such proposal should be enacted.

5. Require parties to provide more information at the commencement of tariff proceedings

a. Re:Sound's Comments

This proposal would not be of assistance in achieving the goals of efficiency and expediency for either collectives or music users. The proposed tariffs filed by collectives already contain detailed information as to the scope of activities targeted, proposed rates, term, reporting provisions, definitions and interplay between the proposed tariff and other tariffs. In addition, the Board also requires that a redline be filed showing all changes between the proposed tariff and the previous tariff. Providing additional information at the time of filing a proposed tariff is unnecessary and serves only to add additional steps and confusion to the tariff process, rather than simplifying it. For the same reasons, Objectors should not be required to provide additional information at the time of filing their objections, and the step of filing replies should be removed.

Any confusion on the part of Objectors or the Board regarding the scope or other provisions of a proposed tariff could be addressed at an initial case conference to identify and narrow the issues. If a potential Objector requires additional information before deciding whether or not to object to a tariff, they could simply contact the collective (which already occurs in Re:Sound's experience) or the Board (who in turn could issue an order to the collective), to obtain the necessary clarification.

Of particular concern, is the suggestion that collectives be required to disclose information regarding how the proposed royalty rates, terms and conditions and effective periods have been determined or the reasons for filing the proposed tariffs at the particular times they are filed. Although the Discussion Paper states that the intent is not to make collectives disclose their confidential strategies or yet-developed arguments, that is the very nature of such information. Furthermore, given the nature of the tariff-setting process, any such disclosure would only increase, rather than reduce confusion for Objectors and the public.

The Copyright Act requires collectives such as Re:Sound to file a proposed tariff with the Copyright Board by March 31 of the year before it takes effect. Re:Sound must therefore propose a royalty rate and tariff structure prior to the commencement of the hearing process and before it has obtained current expert economic evidence on the value of music to that industry or received input from the parties representing the industry impacted by the tariff. As a result, Re:Sound typically modifies its tariff proposal (often more than once) over the course of the hearing process in response to the input and new information received from the relevant industry as well as the results of the expert studies and reports commissioned by the parties such as music use and repertoire studies, surveys on the value of music, and expert economic analysis.

There is therefore no practical benefit to requiring a collective to file details of the basis of its tariff proposal, particularly rate calculations, at the time of filing the proposed tariff. The time for providing details and rationale for the proposed tariff is when the collective files its Statement of Case, at which point it will have obtained the necessary current industry information through the

interrogatory process and relevant valuation studies from its experts. In addition to prejudicing a collective's litigation strategy, such advance disclosure will only create confusion for music users, as it requires a collective to provide a rationale for a proposal that will likely be supplanted and modified during the hearing process, making such information irrelevant and misleading. As discussed below under Re:Sound's additional suggestions for reform, much of this confusion could be eliminated if collectives were not required to propose rates at the time of filing tariffs, but rather at the time of filing their Statement of Case, which is the procedure followed in the U.S.

The current language in section 68(1) of the Act which provides for a collective to file a written reply to an objection should be removed. For the same reasons outlined above, it is not possible at such an early stage of the proceeding for a reply to include sufficient details to be useful and indeed in Re:Sound's experience, the practice of filing replies has been discontinued. Eliminating this unnecessary step would assist in the overall goal of streamlining the Board's procedure and making it more efficient for all participants.

The suggestion that a collective be required to send notices to known users that would be targeted by the proposed tariff or that otherwise have paid royalties pursuant to a previously certified tariff that the proposed tariff is sought to renew would not benefit either collectives or music users. The effort and cost of contacting tens of thousands of individual businesses, even by email would be prohibitive and also raises concerns regarding compliance with privacy and anti-spam legislation. In addition, individual businesses who are unfamiliar with the tariff-setting process are likely to be unnecessarily confused and annoyed by receiving such a notice from a collective like Re:Sound. Communication with individual businesses and broadcasters is much better achieved through industry associations who are familiar with the Copyright Board and the tariff-setting process and are much better suited to communicate such information to their members. As is the Board's current practice, relevant industry associations should receive notice from the Board of proposed tariffs where possible.

b. Recommendations regarding the appropriate enacting instrument

No such proposal requiring the provision of additional information at the time of filing tariffs should be enacted and section 68(1) of the Act should be revised to remove the process of filing replies.

6. Permit all collective societies to enter into licensing agreements of overriding effect with users independently of the Board

a. Re:Sound's Comments

As a collective society governed by sections 67-68 of the Act, which currently must file all proposed tariffs for certification by the Board, on behalf of its rights holders, Re:Sound would welcome the option of licensing users by agreement rather than by tariff where possible. Such a regime already exists for other types of collective societies subject to sections 70.1-70.6. It is also common practice internationally, where in most instances, rates are set by the applicable

tribunal only as a measure of last resort, where the collective society and users are unable to come to an agreement[6].

While it would not likely be possible for Re:Sound to negotiate agreements with all users, particularly for public performance tariffs such as those which apply to individual stores and restaurants, for single-user tariffs (such as CBC and Satellite Radio) or where all or most users are represented by one or more industry association (such as commercial radio), the option of avoiding the time and expense of a hearing before the Board where an agreement can be negotiated would be beneficial to both Re:Sound and music users and would reduce the number of matters that the Board must consider. Allowing parties to negotiate their own terms respects the free market and gives parties much-needed early certainty regarding their royalty obligations, while saving the time and expense of a hearing for the parties and the unnecessary use of the Board's resources.

Re:Sound is already in the practice of negotiating tariff settlements with users, however it must still file those settlements with the Board for certification, which can take as long or longer than the time for a hearing. As mentioned under issue 2, Re:Sound proposes that a fast-track process be implemented for the approval of such settlements, which would be an additional means of reducing the demand on the Board's resources. Such a process would still be necessary where tariff certification is optional in cases where Re:Sound is able to reach an agreement with some, but not all affected users and wishes to certify a tariff on the basis of its settlement in lieu of a full hearing. In addition to setting timelines for the approval of tariff settlements, Re:Sound proposes that criteria be established allowing for a fast-track procedure, such as the following:

(1) Where a joint submission for certification of a tariff is filed by the relevant collective society and one or more Objectors or other prospective licensee, the Board shall:
(a) Consider the tariff on the basis of written submissions on an expedited basis;
(b) Within 30 days of the joint submission, request any additional information required from the parties and set a schedule for any additional written submissions; and
(c) Certify the tariff on the terms and conditions proposed by the joint submission, subject to any alterations the Board considers necessary to address the submissions of any Objectors not parties to the agreement.
(2) The Board shall certify and publish the approved tariffs as expeditiously as the circumstances and considerations of fairness permit, and no later than 6 months after the date of the joint submission.

The suggestion that all of agreements would have to be filed with the Board and made public disadvantages both collectives and music users and would undermine the goal of encouraging settlements to reduce the use of the Board's resources. While it would be important to be able to avail itself of the optional process of filing agreements with the Commissioner of Competition pursuant to sections 70.5-70.6, to make the filing of all agreements mandatory would seriously undermine the ability of collectives and music users to enter into agreements at all. Not all

[6] For example, in Australia, the U.K., New Zealand, the Netherlands, France, Germany, Spain and Italy, rates are set by negotiation and proceedings before the Tribunal or Courts only occur where agreement cannot be reached. In Denmark, Finland, Iceland, Sweden, Norway, there is an Extended Collective Licensing system in place which is negotiated by agreement but requires approval by public authorities in all countries except Sweden.

agreements are intended to be of precedential effect or are of general applicability. Some industries or particular users may require a licensing arrangement that is applicable only to their specific needs. In other cases, confidential compromises may be agreed to, for administrative efficiency, particularly where the royalties payable by a user or user group are very low. Such agreements would only be entered into where confidentiality is assured and all parties agree that the agreements are not of a precedential nature. To require that they be made public and producible to the Board not only interferes with commercial interests and the operation of a free market, it would lead to inappropriate and inapplicable benchmarks being relied on by the Board. This is particularly true of the suggestion that the Board could create a catalogue of agreements to rely on as benchmarks in other proceedings. It would be wholly inappropriate to allow the Board to set rates based on agreements not filed by the parties to the proceeding without any evidence as to how they were negotiated or what relevant factors influenced them. Further, it would be impossible for collectives to reach agreements with many music users if public filing was required, thereby eliminating the many benefits of allowing for agreements to be entered into in lieu of tariffs such as reducing the use of the Board's resources.

The individual dispute resolution process provided for under sections 70.2-70.4 would not be practical for the rights that Re:Sound administers, which is that of equitable remuneration. Re:Sound cannot prevent users from using its member's music or sue for infringement. It is therefore not necessary for a user to have an agreement with Re:Sound in order to use music. However, they would be required to pay equitable remuneration as determined by either agreement or by the Board. Where it is unable to reach agreement on the applicable royalties with one or more users, it would be far more efficient to set a tariff of general application than to involve the Board in multiple individual dispute resolutions.

b. Recommendations regarding the appropriate enacting instrument

Amendment of the Act would be required, to include provisions similar to sections 70.12, 70.19, 70.191 and 70.5-70.6 to the regime governed by section 67-68. As discussed above, the individual dispute resolution mechanism provided for in sections 70.2-70.4 is not practical and unnecessary to import into the section 67-68 regime for the right of equitable remuneration.

7. Change the time requirements for the filing of proposed tariffs

a. Re:Sound's Comments

The filing of multiple-year tariffs should be encouraged through Rules of Procedure, but not mandatorily required. Re:Sound typically proposes tariffs for terms of three to five years in order to reduce the frequency of its tariff filings and to allow it to negotiate and certify a tariff for several years at a time. However, in certain circumstances, a one year term is more appropriate, for instance where a pending Board or Court decision on the prior tariff will impact the proposed tariff, or for rapidly-changing industries such as music streaming, where the scope and definition of uses to be covered as well as the relevant market rates, could change significantly in a year.

It is not the number of proposed tariffs that are filed each year which occupies the Board's resources, but rather the frequency of tariff hearings or written requests for certification. The real

issue is the length of the tariff term that is under consideration in a particular proceeding. The Board could require that tariffs be certified for a certain minimum length such as three or even five years, which is typically what occurs in practice now. The Board could also require that all tariff periods that have been proposed by the time of a hearing or decision, be certified as part of that decision. This still allows flexibility as to how tariffs are proposed, but ensures that proceedings are not initiated for the same tariff every year.

b. Recommendations regarding the appropriate enacting instrument

Requiring that tariff proceedings deal with a minimum time period could be addressed through the Board's Model Directive of Procedure or through new Rules of Procedure. It could also be more formally enacted by Regulation pursuant to section 66.6(1)(a) or section 66.91.

8. Require proposed tariffs to be filed longer in advance of their effective dates

a. Re:Sound's Comments

The proposal to move the filing deadline for proposed tariffs to January 31 of the year prior to when they take effect in order to accommodate issues with the Canada Gazette's schedule makes sense. However this step on its own, will do little to speed up the certification process. The more important measures required to reduce the effect of Board decisions on past periods are timelines for certification, and certification of longer tariff periods. Allowing parties to enter into agreements in lieu of tariffs and a fast-track certification process for settlements will also reduce, or eliminate altogether, the issue of past periods. Moving the filing deadline any earlier than January 31st of the prior year is problematic as it becomes even more difficult to predict market rates so far in advance and it also creates a risk of rights holders losing out on royalties for new uses of music or new rights that be enacted after the filing deadline has passed.

b. Recommendations regarding the appropriate enacting instrument

Changing the filing deadline for proposed tariffs under the regime applicable to equitable remuneration would require an amendment to section 67.1(1) of the Act.

9. Allow for the use of the copyrighted content at issue and the collection of royalties pending the approval of tariffs in all Board proceedings

a. Re:Sound's Comments

Section 68.2(3) of the Act allows Re:Sound to continue collecting royalties on behalf of its rights holders under the previous tariff until the renewal tariff is certified. This is a very important provision as it allows rights holders to continue receiving royalties without the need to obtain interim tariffs, as is the case for certain other regimes. It does not however, address the issue of inaugural tariffs for new uses of music, for which the rights holders represented by Re:Sound cannot collect royalties until the tariff is certified and for which delays in certification have a serious prejudicial effect on both rights holders and users. The Board typically refuses to issue interim tariffs in the case of inaugural tariffs. As discussed above, it is proposed that certification

of inaugural tariffs be prioritized and that statutory timelines for decisions be implemented. Coupled with the ability to enter into agreements in lieu of tariffs, these measures will all assist in reducing the impact of retroactive tariffs.

b. Recommendations regarding the appropriate enacting instrument

Section 68.2(3) is essential to rights holders' ability to receive royalties and must be maintained.

10. Codify and clarify specific Board procedures through regulation

a. Re:Sound's Comments

Regulations codifying and clarifying the Board's procedures would be beneficial for all participants. It would also be helpful to have a searchable database of the Board's interim rulings on procedural issues such as interrogatories, confidentiality, and participation of intervenors.

(a) Statement of Issues

Early identification and narrowing of issues can help make a proceeding more efficient. However, any proposed changes that would add to the number of steps and written submissions involved in a proceeding, as opposed to simplifying it, would be contrary to the stated objectives of this consultation. As discussed above, an initial case conference call could be used to achieve this same purpose, reducing the time and process involved in negotiating and drafting a joint statement. For the reasons discussed above under proposal 2, deadlines should not be triggered starting from the objection date as this interferes with the negotiation of settlements and takes away the parties' ability to decide which tariff proceedings should proceed by way of hearing and when. Deadlines should be triggered from the date a hearing is requested. For example, the initial case conference could be required to be held within 30 days after the request for a hearing, and used to discuss the issues and setting the schedule.

(b) Interrogatory Process

The various suggestions outlined in the Discussion Paper for clarifying expectations and procedures involved in the interrogatory process are helpful. If as suggested above, the requirement for collectives to file replies to objections to tariffs is removed, the suggestion that interrogatories not be exchanged until after this step would not be necessary. As discussed above, interrogatory motions could be largely dealt with by oral submissions in a case conference call, reducing the need for detailed written submissions. As rulings on issues such as relevance, sufficiency of responses and appropriate sample size will be specific to the case at hand, such issues are best decided on a case by case basis through discussion by the parties and the case manager. However, access to a searchable database of the Board's prior rulings on such issues and the issuance of Practice Notices would be helpful in providing the parties with greater guidance on how the Board will rule on such issues.

(c) Simplified Procedure

Rather than creating a simplified procedure only for specific types of cases (particularly as determining a monetary value for tariffs in advance can be difficult, if not impossible), various simplified procedures (as listed below) could be made available in all proceedings, where appropriate and as determined by the parties and the case manager. As outlined above, a fast-track process for tariffs that are unopposed or based on settlements should be implemented. In such cases, no oral hearing or evidence such as expert reports are required as the matter would proceed expeditiously, on the basis of written submissions. For all other proceedings, effective case management would allow for the identification of steps that could be removed, simplified or expedited where appropriate, such as:

(i) Limitations on the scope and volume of interrogatories;
(ii) Allowing certain witnesses to provide evidence entirely in writing, or evidence-in-chief in writing and oral cross-examination;
(iii) Allowing witnesses to present evidence in a panel; and
(iv) Page limits on expert reports, witness statements and statements of case.

(d) Evidence

Clarity regarding the type of evidence that the Board finds useful and consistent rules regarding how it is to be presented would be helpful. Too frequently, the Board completely discards the expensive and time-consuming expert evidence and studies commissioned by the parties in favour of its own internal analysis, upon which the parties do not have an opportunity to review or comment. A case management process in which the type of evidence the parties intend to produce is discussed early in the proceeding and the Board's input is obtained, including on any joint studies, would be useful.

The suggestion that the Board be able to appoint independent experts would not assist in the objectives of this consultation. This would only exacerbate the existing problem of the Board rendering its decisions based on evidence and/or analysis that is not part of the hearing and in which the parties themselves do not have the opportunity to participate. As is discussed under proposal 13, clear and objective rate-setting criteria should be established, including the requirement that decisions be based on the evidence that was before both the Board and the parties during the hearing.

As discussed above, procedures that would simplify the evidence filed, such as limiting the evidence of certain witnesses to written reports only would be very helpful in making proceedings more efficient. Increasingly, the experts that appear before the Board provide direct testimony using detailed power-point presentations which they simply read out loud. There is little value in this process, which could be replaced by simply filing both reports and presentations well in advance of the hearing, and allowing for cross-examination and answers to the Board's questions.

(e) Confidentiality

Any proposal which would result in sensitive, commercial or proprietary information being made public against the wishes of the supplier of that information would undermine the objectives of this consultation. In order for the Board to have the best information available to it to determine

rates based on current, relevant, financial data including market-place agreements, the protection of such information must be assured. Otherwise, parties will be severely constrained in the type of evidence they are able to file. Parties may be reluctant to even participate in Board proceedings if it means they are subject to production orders of highly sensitive information for which confidentiality cannot be assured.

b. Recommendations regarding the appropriate enacting instrument

The procedures outlined above could be established by Regulation pursuant to either section 66.91 or 66.6(1)(a).

11. Stipulate a mandate for the Board in the Act

a. Re:Sound's Comments

Providing a statutory mandate for the Board would provide important clarity for the Board, the parties that appear before it, and reviewing Courts. The following proposed mandate is similar to that proposed by other stakeholders and is consistent with the principles stated in the Discussion Paper and established by the Supreme Court of Canada, as well as those which apply to similar international tribunals[7]:

a. that the Board certify tariffs in a manner that serves to safeguard, enrich and strengthen the cultural, social and economic fabric of Canada;
b. that the Board certify tariffs in a timely, efficient and predictable manner, and ensure that the expenditure of resources in all proceedings before it is proportionate to the nature and complexity of the parties' disputes and respective positions;
c. that the Board ensure that royalty rates and their related terms and conditions are fair and based on the best evidence submitted by the parties, including where available and applicable, rates established in other jurisdictions for similar rights, and the rates that would have been negotiated in the marketplace between a willing buyer and a willing seller, based on an assessment of the economic, competitive and other information presented by the parties;
d. that the Board carry out its business to facilitate the development and growth of markets that produce and use copyrighted content to:
    a. maximize the availability of creative works to the public; and
    b. afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions;
e. to reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication; and

[7] U.S., 17 USC §801(b) and 112(e)(4).

f. to minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry market conditions.

b. Recommendations regarding the appropriate enacting instrument

This proposal would require amendment of the Copyright Act.

12. Specify decision-making criteria that the Board is to consider

a. Re:Sound's Comments

Together with setting timelines for decisions, establishing objective rate-setting criteria, is the most important reform needed to achieve the objectives of this consultation. As recently noted by the Federal Court of Appeal, the absence of any Regulations providing criteria to guide the Board's decision-making, leaves it with broad, unfettered discretion[8]. Under section 68(2)(b) of the Act, the Board may take into account "any factor that it considers appropriate." The result of this lack of clear rate-setting criteria is that the evidence submitted by the parties is routinely discarded by the Board in favour of its own internal analysis, creating a lack of predictability for parties as to what type of evidence to adduce and what the result will be. It has also resulted in rates established by the Board that are completely out of step with international rates set for the same rights and same uses of music. The reason frequently given by the Board for ignoring international rates, is the fact that they are subject to rate-setting criteria which do not apply in Canada. To address these issues, rate-setting criteria should be established and should be based on the criteria that are widely applied internationally.

The most common rate-setting criteria applied internationally is market rates or the rates that would have been agreed to between a willing buyer and a willing seller[9]. The following criteria should be established to ensure that the Board's rate-setting process is objective, consistent with international practices, and founded in economic principles:

[8] Re:Sound v. Canadian Association of Broadcasters, 2017 FCA 138, par. 18, 42, 48.

[9] In the U.S., when setting webcasting rates, the Copyright Royalty Judges are specifically directed to "establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 USC §114(f)(2)(B); In the E.U., "the rights to remuneration shall be reasonable in relation to … the economic value of the rights in trade." E.U. CRM Directive Art. 16(2); In the U.K., Hong Kong and Zealand, the applicable statute requires that the Tribunal have regard to, "(a) the availability of other schemes, or the granting of other licences, to other persons in similar circumstances; and (b) the terms of those schemes and license. U.K. Copyright, Designs and Patents Act, 1988, s.129, Copyright Ordinance of Hong Kong, s.167, New Zealand Copyright Act, 1994, s.161. The U.K. Copyright Tribunal "has frequently addressed the [rate-setting] matter on the basis that the proper rate is that which would be negotiated between a willing licensee and a willing licensor of the copyright repertoire, The British Phonographic Industry Limited & Ors v. The Mechanical Copyright Protection Society Limited & Ors, 19 July 2007; In Australia, the Copyright Tribunal has established a series of criteria that may be adopted including: market rate: the rate actually being charged for the same licence in the same market in similar circumstances; notional bargain rate: the rate on which the Tribunal considers the parties would agree in a hypothetical negotiation, between a willing but not anxious licensor and a willing, but not anxious licensee; comparable bargains: bargains not in the same market but sufficiently similar to such a notional bargain as to provide guidance to the Tribunal; previous agreements or negotiations between the parties; and comparison with other jurisdictions, Phonographic Performance Company of Australia Limited under section 154(1) of the Copyright Act 1968, Decision of the Copyright Tribunal of Australia dated May 17, 2010, par. 114.

(1) Where applicable, the Board must have regard to the following criteria in establishing fair and equitable royalties to be paid pursuant to the Act:
    a. Market-rates negotiated between willing sellers and willing buyers as evidenced by agreements between rights holders and music users for substantially the same rights in question;
    b. Royalties paid for substantially the same rights in other jurisdictions;
    c. Agreements between the relevant collective society and one or more prospective licensees with respect to the terms and conditions of the tariff; and
    d. In all cases, royalties are to be established based on the best evidence provided to the Board by the parties.

b. Recommendations regarding the appropriate enacting instrument

The rate-setting criteria described above should be enacted by Regulation pursuant to section 66.91 of the Act.

13. Harmonize the tariff-setting regimes of the Act

a. Re:Sound's Comments

The suggestion of harmonizing and consolidating the various tariff-setting regimes under the Act should be adopted where possible and applicable, with the exception of provisions that may not be applicable to all regimes, such as sections 70.2-70.4 which are not practical with respect to the right of equitable remuneration.

b. Recommendations regarding the appropriate enacting instrument

Such changes would require amendment of the Act.

<u>Additional Proposed Reforms</u>

On behalf of its rights holders, Re:Sound suggests the following additional options for reform:

14. The Board should consist of at least three full-time members

The Act provides that the Board shall consist of not more than five members which may be either full or part-time[10]. Currently, there are three members of the Board, only one of which is full-time. While the Board is unusual in its large staff of internal economists and legal counsel, it is the Board members who are responsible for determining rates and drafting decisions. If the Board had five members, at least three of which were appointed on a full-time basis, it would be better equipped to convene hearings and render decisions on an expeditious basis. For example, the U.S. Copyright Royalty Board, which has statutorily-imposed time limits on its decisions, has three full-time judges to work on decisions[11]. This change does not require any statutory or

[10] S.66(1)(2)
[11] 17 USC § 801(a)

regulatory amendment as the current wording allows for either full or part-time members, however in order to ensure that three full-time members are always appointed, section 66(2) of the Act would require revision.

15. Collectives should not be required to propose rates at the time of filing tariffs

As discussed above under proposals 5, 7 and 8, a number of procedural issues are created by virtue of the fact that collectives are required to propose rates in their tariff filings long before the relevant industry and economic evidence can be obtained to determine the ultimate rates for which certification is sought. In addition, the Board applies the principle of ultra petita and will refuse to certify rates that are higher than what the collective initially proposed. The result is that a collective must propose initial rates based on its best estimates, allowing for potential increases to ensure it is not prevented from obtaining the rates that will later be calculated based on evidence on the grounds of ultra petita. This results in tariff proposals and formula which are typically revised, often several times over the course of a proceeding. It also limits a collective's ability to adopt proposed reforms such as filing for tariffs earlier and for longer periods. If the requirement to specify a rate and formula in the initial tariff proposal were removed, the process could be greatly simplified and there would be less confusion for objectors and the public.

A tariff could simply specify the rights and uses that it covers, with the details of rates, formula and definitions to be provided at the time of the collective's statement of case. This is the procedure that applies for proceedings by SoundExchange before the U.S. Copyright Royalty Judges. While this might mean that all affected users would need to file objections as the proposed rates are unknown, in Re:Sound's experience, this is what occurs in any event, regardless of the rates that are proposed. Further, it is beneficial to have as many interested users file objections as possible as this allows Re:Sound to consult with as much of the industry as it can in trying to negotiate a settlement and devise a tariff that works for both users and rights holders. This process could also assist in making proceedings less adversarial, with the goal of encouraging music users to be participants in the process as opposed to "objectors". This change would require an amendment of section 67.1 of the Act with respect to the regime that applies to Re:Sound.

Conclusion

The Discussion Paper proposes a number of methods of reform that will be extremely helpful in improving the efficiency and expediency of the Board's processes. As noted above, the most important of these are:

1. Imposing statutory deadlines for Board decisions;
2. Establishing objective rate-setting criteria;
3. Making the tariff certification process optional for all collectives; and
4. Implementing case management of Board proceedings.

In order to implement these reforms as quickly as possible, it is recommended that Regulations be passed where applicable, with the longer-term process of amending the Copyright Act to follow.